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September 15, 1998

VIA HAND DELIVERY

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: **Comments of Retail Internet Service Providers**
CC Docket 98-146

Dear Ms. Salas:

Enclosed for filing is a *revised* original and four copies of the comments filed yesterday on behalf of the Retail Internet Service Providers in the above-referenced docket. The filing has been revised to correct several *minor* typographical errors in the parties captions on the cover page and on the signature page ("coalition" and "individual" were spelled incorrectly). The text of the comments remains unchanged.

Sincerely,

Christopher W. Savage (by cac)

Christopher W. Savage

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996

CC Docket 98-146

COMMENTS OF RETAIL INTERNET SERVICE PROVIDERS

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Dated: September 14, 1998

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COMMENTS OF RETAIL INTERNET SERVICE PROVIDERS

1. Introduction and Summary

These comments are being filed by a group of retail Internet Service Providers (the "Retail ISPs")[1] in response to the Commission's *Notice of Inquiry* in the above-captioned matter.[2]

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[1] These Comments are being filed on behalf of the following ISPs and associations: APKNet, Ltd.; Helicon On-Line; LARamie Internet Access and Telecommunications ("Lariat.org"); New Mexico Technet, Inc./TFP, Inc.; ProAxis Communications; Western Regional Networks, Inc.; and wyoming.com, LLC; the Coalition of Utah Independent Internet Service Providers ("The Utah Coalition") (ArosNet; Burgoyne Computers, Inc.; CastleNet; Coastlink; DirecTell; EagleNet Online;Fibernet; I-80; InfoWest; Internet Connect; Internet Technology Systems; inQuo; Konnections; NETConnect;Connect A Net; PCFastNet; PDQ Internet; Redrock Internet; SISNA;Software Solutions;Utah Internet Services; VitrexNet; Vyzynz;Wasatch Communications Group; WebIt!; Web Guy Productions; Western Regional Networks; XMission; XPressweb); and the Texas Internet Service Providers' Association ("TISPA"). TISPA is the largest, and one of the oldest, state organizations serving ISPs. The organization was formed in 1995 and is composed of 367 full and associate members.

[2] In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, *Notice of Inquiry*, CC Docket No. 98-146 (released August 8, 1998) ("*Notice of Inquiry*").

At the outset, the Retail ISPs appreciate the fact that the Commission has recognized the role that the Internet in general, and ISPs in particular, play in helping to promote the availability of advanced telecommunications services and capabilities. Growing demand for high-bandwidth access to the Internet is one of the main forces behind the demand for high-bandwidth, advanced telecommunications capabilities and services.[3] Consequently, preservation of competitive conditions in the market for high-speed Internet access has a critical role to play in harnessing the forces of competition to promote the deployment of advanced telecommunications capability — such as xDSL-equipped copper loops — in fulfillment of the mandate of Section 706 of the Telecommunications Act of 1996 (the "1996 Act").[4]

There is a real danger that incumbent local exchange carriers ("ILECs") can wreak severe harm on independent ISPs and the competitive market in which they presently operate. This would be an ironic — not to say unwarranted — outcome in light of the leading role that ISPs have taken in developing the market for Internet access in general, and high-bandwidth access in particular, over the last several years.

The problem is not that the ILECs have devised some particularly clever or insidious anticompetitive tactics. To the contrary, the problem is that three anticompetitive strategies that were well-established in the telephone industry decades ago — discrimination in favor of affiliates, bundling of services, and refusing to provide technically feasible services non-affiliates need — are likely to be particularly effective in derailing competition in the market for high-speed access to the Internet. This arises because the predominant reason consumers want xDSL service is to obtain a high-bandwidth connection to an ISP. It is hard to imagine another situation in which efforts

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[3] *See, e.g., Notice of Inquiry* at ¶ 60 ("Does the explosive growth of the Internet indicate an immediate demand for Internet access at higher speeds than are now standard, and for other forms of advanced services?")

[4] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C.§§ 151 *et seq.*

to discriminate could be so effectively targeted at precisely the users of a regulated service (xDSL transmission) who would be amenable to considering using the affiliate's unregulated services.

In light of the peculiar vulnerability of the high-speed Internet access market to anticompetitive discrimination by ILECs, and in light of the specific command of Section 706 that advanced telecommunications capabilities be made available on a competitive basis, special Commission action is warranted in this area. Specifically, the Retail ISPs see three principal sources of danger from anticompetitive ILEC activities, with three corresponding prophylactic remedies that the Commission should impose:

- **First,** the ILECs must be barred from any form of discrimination favoring their ISP affiliates in the course of selling telecommunications services (such as xDSL).

- **Second,** as some of the responding ISPs have urged the Commission in other proceedings, the ILECs should be affirmatively required to offer clean, unswitched point-to-point copper transmission paths between end users and ISP-designated locations. This will permit ISPs and their customers to establish their own high-capacity connections using their own xDSL customer premises equipment ("CPE"), with minimum dependence on (and, therefore, minimum potential interference from) the ILEC.

- **Third,** the ILECs must be barred from bundling xDSL services with frame relay or other services used in transporting data between an ISP's location and individual end users' xDSL-equipped loops. Many ISPs have established good working relationships with one or more competing LECs ("CLECs"), and ISPs should be able to use them to the maximum extent possible.

These actions would directly further the express goal of Section 706. A functioning competitive market for high-speed Internet access services will provide enormous pressure on ILECs and CLECs alike to deploy xDSL technology as rapidly as necessary to meet market demand. This, in turn, will stimulate competition among providers of xDSL transmission services to provide those services at the lowest price and highest quality. As a result, one of the best ways to ensure widespread deployment

of advanced telecommunications capabilities such as xDSL is to ensure that competitive market forces are allowed to operate fully in the high-speed Internet access market.

2. Retail ISPs Are On The Front Lines Of Stimulating Demand For Advanced Telecommunications Capabilities.

As the Commission notes, there are more than 4,000 ISPs offering service to end-user customers nationwide.[5] Participants in this flourishing entrepreneurial market routinely adapt to new and innovative technology simply to survive. This has led many retail ISPs to upgrade their modems, routers and servers, as well as their connections to the public switched network to respond to new developments (such as the development of analog modems capable of handling a 56 kbps downstream data rate). Moreover, ISPs are in constant competition for end user subscribers. This competition takes place along dimensions of price (*e.g.*, flat rated vs. measured service options, and the prices of each); quality of service (*e.g.*, likelihood of encountering busy signals; speed of download of files from the Internet); and features (*e.g.*, number of email accounts provided; amount of storage space provided; whether hosting an individual "home page" is included). The market for end user access to the Internet, in short, has been a competitive market that works.[6]

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[5] *See Notice of Inquiry* at ¶ 37. The Retail ISPs note that in any particular community, a much smaller number of ISPs will be available via a local dial-up connection. In this regard, while we question the policy basis for the question later in the *Notice* as to whether "access by retail customers to thousands of ISPs [is] in the public interest," *see id.* at ¶ 79, the fact is that even in large metropolitan areas any particular retail customer would have local dial-up access to at most a few dozen retail ISPs. Indeed, in most communities, the figure would be much, much smaller.

[6] This is no doubt attributable in large measure to the Commission's long-standing regulatory policy, now embodied in the text of the Communications Act itself, that ISPs, as providers of information services, are unregulated end users of telecommunications. *See, e.g.*, In the Matter of Federal-State Joint Board on Universal Service, *Report To Congress*, CC Docket No. 96-45 (April 10, 1998) at ¶ 13 ("We conclude ... that the categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive."). *See id.* at ¶ 21 (footnote omitted) ("We find ... that Congress intended to maintain a regime in which information service providers are not subject to regulation as (continued...)

From this perspective, the introduction of high-capacity xDSL service to end user customers is simply the next round of technical innovation demanding a competitive response from ISPs. In this regard, the Commission should be aware that it was ISPs, not ILECs or even CLECs, who pioneered the use of xDSL equipment to provide high-speed Internet connections to end user customers. As equipment from firms like PairGain began to become commercially available, innovative ISPs realized that a common, existing telephone company service offering — the "alarm" or "local area data" circuit — could be converted to a high-bandwidth pipe by the addition of xDSL CPE on both ends of the circuit. These progressive ISPs purchased these "plain copper" circuits, attached xDSL equipment to them, and were delivering high-bandwidth Internet access to customers before this issue achieved the national prominence it has now received.[7]

In any event, as the web pages that (in the main) drive consumer interest in the Internet develop more intense graphics, and increasingly include video content for downloading and/or streaming, greater and greater bandwidth is needed in order to

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[6](...continued)
common carriers merely because they provide their services 'via telecommunications'.") Among other things, this has permitted ISPs to make their information services available to end users by means of a local telephone call, and spared ISPs (and their customers) from having to bear the non-cost-based, subsidy-laden per-minute access charges that the ILECs have long wanted to impose on them.

[7] This innovative use of dry copper combined with xDSL CPE is simply an example of the public interest benefits flowing from the Commission's long-standing rule that customers may attach CPE to the network for purposes that are privately beneficial without being publicly detrimental. This has been the law for more than 40 years, *see Hush-A-Phone Corp. v. U.S.*, 238 F.2d 266 (D.C. Cir. 1956), although the Commission has from time to time found it necessary to restate the basic principle and how it applies in particular cases. *See, e.g.,* In the Matter of International Business Machines Corporation, Request for Declaratory Ruling re State Regulation of Shared Telecommunications Services Systems, *Memorandum Opinion and Order,* 59 Rad. Reg. 2d (P&F) 964 (1986); In the Matter of Telerent Leasing Corp., *et al.,* Petition for Declaratory Rulings on Questions of Federal Preemption on Regulation of Interconnection of Subscriber-Furnished Equipment to the Nationwide Switched Public Telephone Network, 45 F.C.C.2d 204 (1974); *Carterfone,* 13 F.C.C. 2d 420 (1968). As discussed below, it appears that the Commission will yet again have to clarify this basic policy for certain ILECs.

meet consumers' expectations of their experience of the Internet. In order to meet these growing expectations, ISPs need to invest in faster and more sophisticated routers, xDSL modems, increased caching capacity, and other new technologies. If a truly competitive market continues to flourish, those ISPs that make wise investment decisions and best meet consumer demand will survive and grow, and those that do not will shrink and eventually fail. Retail ISPs all accept this competitive reality as part of their daily operating environment.

Largely for this reason, at bottom, all that retail ISPs want from regulators such as the Commission is the preservation of a regime in which competition for end users — on the basis of price, service, and features — can continue, with high-bandwidth access added to the mix. Unfortunately, the experience of retail ISPs in dealing with ILECs in the context of recent ILEC xDSL rollouts shows that determined Commission action will likely be needed to preserve a competitive environment against the natural tendency of monopolistic suppliers of telecommunications services to expand their monopoly to adjacent markets.

3. xDSL Service Creates A Unique Opportunity For ILECs To Abuse Their Monopoly Position In The Local Exchange Market.

The *Notice of Inquiry* aptly summarizes the questions that confront the Commission in trying to encourage the deployment of xDSL technology while preserving and promoting competition:

> 38. We ask for comment on how the Commission can ensure that customers are free to choose their own ISPs, especially in markets where the in-region incumbent LEC, or an affiliate of it, is the only provider of advanced telecommunications capability, such as xDSL. What, if anything, should the Commission do to promote provisioning of xDSL by incumbent LECs that does not bundle and does not direct customers to the incumbent LECs' affiliated ISPs? Regardless of whether an incumbent LEC or an affiliate offers xDSL service, should the Commission require this service to be provided to independent ISPs and the affiliated ISP only on equal terms and conditions? How can the Commission ensure that

independent ISPs are able to obtain efficient and competitively priced local transport services from incumbent LECs?

Notice of Inquiry at ¶ 39 (footnote omitted).

There is a simple reason that xDSL deployment is so intimately linked to competition in the market for retail Internet access. Simply put, today essentially the only reason that a consumer or small business would order xDSL is to obtain high-speed access to the Internet. The fact that a consumer contacts an ILEC seeking an xDSL connection, therefore, basically guarantees that the consumer uses, or is highly interested in using, the Internet.[8]

Consequently, the mere fact that an inquiry about an xDSL service is made — and, even more so, the fact that the service is ordered — is extraordinarily valuable competitive information in the market for retail Internet access. The ILEC will acquire this information only in its role as a monopoly provider of telecommunications service. Yet the ILEC will have both the incentive and ability to use this information to favor its own unregulated ISP operation over those of competing ISPs. The rollout of xDSL service, therefore, creates a unique opportunity for the ILEC to take advantage of its monopoly status in the local exchange market to advance its position in the Internet access market.[9]

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[8] A certain number of consumers will order xDSL service in order to obtain high-speed access to a corporate local area network ("LAN"). In practical terms, however, consumers who understand the need for, and want to use, high-speed access to a corporate LAN, are likely to be prime consumers of Internet access services as well.

[9] In this regard, a customer inquiry about xDSL is a much better predictor of interest in Internet access service than is, say, a customer inquiry about a second line. While many second lines are indeed used by customers to access the Internet, they are also used for many other purposes, such as sending and receiving faxes, or simply allowing different members of the household to make voice calls at the same time.

Any doubt that the ILECs can and will abuse their market position in the context of xDSL can be dispelled by the recent complaint filed against U S West by the Minnesota Attorney General's office.[10] That complaint details the following discriminatory and anticompetitive conduct:

- The ILEC's ISP affiliate received preferential advance knowledge of the rollout of the consumer xDSL offering.
- The ILEC's ISP affiliate received preferential treatment regarding the installation of the required links from the ISP operation to the customer xDSL data.
- Customers calling to order xDSL service were prompted to "Press 1" to connect their service to the ILEC's ISP affiliate (whose name was confusingly similar to the ILEC's name) and to "Press 2" for any other ISP, none of whom were listed by name.
- Even where competing ISPs had obtained connections to the data network to which xDSL traffic was routed, the ILEC engaged in "slamming" customers from competing ISPs to the affiliated ISP.

These discriminatory U S West practices are not limited to Minnesota. As the members of the Utah Coalition know first-hand, U S West has engaged in extensive efforts in connection with its Utah roll-out of xDSL and related services to favor its own affiliated ISP over independent ISPs. The Utah Coalition is filing separate comments in response to the *Notice of Inquiry* to provide more record evidence on this topic.

Each of these discriminatory ILEC practices creates a situation in which early adopters and intense users of the Internet — good Internet customers, manifestly willing to pay more for higher-quality service — are routinely directed away from their existing ISP (or the independent ISPs who might be in a position to serve a new customer) toward the ILEC-affiliated ISP. The market advantage thus obtained by the ILEC-affiliated ISP is not based on any superiority in terms of service quality, pricing,

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[10] *See* Attachment A hereto. A copy of the complaint is available on the Internet at http://www.haven.com/AGPSCcomplaint.html.

or features offered to customers. It is based simply on the fact that the ILEC-affiliated ISP is affiliated with the monopoly ILEC.[11]

Even assuming that an independent ISP can obtain or retain high-speed access customers, an ILEC can establish (and U S West, for example, has established) serving arrangements that put the ILEC in a position to extract monopoly rents from the ISP. This is accomplished by bundling access to the data flowing over an end user's xDSL service with (a) high-speed packet-switched interoffice transport to an aggregation point and (b) connections from ISP locations to that aggregation point.

Stated simply, if an ILEC end user signs up for xDSL service, the ILEC will automatically route that customer's Internet data to an ILEC-supplied interoffice packet switched network, to which ISPs must (for a fee) connect in order to serve their own subscribers. Moreover, as the Retail ISPs understand the U S West situation, in many instances U S West will not permit the ISP to use a CLEC even for the unswitched DS-1 or DS-3 "pipes" from the ISP's location to the U S West central office where the packet data stream can be obtained; even that pipe must be purchased from U S West.[12]

It bears emphasis here that, while xDSL service and the Internet are indeed new and exciting developments in the communications world, in some sense the situation that confronts the Commission is "déjà vu all over again." The incumbent LEC monopolists see an opportunity to expand their power from control of the local exchange

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[11] In this regard, any "success" of the affiliated ISP in the market is analogous to the financial "success" of those who have inherited great wealth. The key skill involved in each case is in choosing one's parents.

[12] The Retail ISPs have no reason to think that U S West's conduct regarding the deployment of xDSL and its relations with its ISP affiliate are any more or less abusive than would be the case with any other ILEC. U S West is simply farther along in its xDSL rollout than any of the other ILECs. U S West, therefore, is in the position to deploy the "first office application" of the most effective anticompetitive practices in this arena. If these practices are not specifically banned by this Commission, they will certainly be adopted by other ILECs as they roll out their own xDSL services.

to control of an adjacent market (in this case, Internet access). To effect this goal, they simultaneously (a) shamelessly discriminate in favor of their own affiliated firm, directing end users away from the affiliate's competitors, and (b) bundle together a variety of services (here, xDSL loops, local packet-switching and data transport, and unswitched point-to-point connections) to extract the maximum possible revenue in those cases where end users do not subscribe to the affiliate's service. While the current incarnation of this "bundling plus discrimination" strategy may be new, on some level what is going on is fundamentally no different than requiring an expensive and unnecessary "protective connecting arrangement" for customers in the 1970s who dared to connect non-Bell equipment to their dial tone lines.

4. There Are Simple Solutions To These ILEC Abuses.

In part because the basic script of ILEC monopoly abuse is so familiar, the framework of the correct regulatory response to it is fairly simple as well. The ILECs must be required to be non-discriminatory; they must be required to offer the serving arrangements that their competitors need to effectively compete; they must permit competitors to interconnect; and they must be required to unbundle their service offerings.

a. Non-Discrimination.

The problem is familiar: the ILECs have the incentive and the ability to use their monopoly control of the local exchange — reflected in their control of the loops used for xDSL service — to unfairly benefit their ISP affiliates. What is unique here is the almost total congruence between customers who order xDSL service and customers who are potential subscribers to the ILEC's ISP affiliate. Not since the days of bundled CPE has there been so clear an opportunity for the ILECs to steer customers who effectively must purchase one item from the ILEC to purchase other, competitively-available items as well.

Because the problem is so familiar, the solution should be familiar as well: impose strict non-discrimination obligations on the ILECs. One obvious precedent for dealing with this problem is the regional Bell Operating Companies' ("RBOCs") traditional equal access obligations. Pursuant both to the AT&T Consent Decree and the Commission's orders, RBOCs were required to be scrupulously neutral in their handling of customer requests to presubscribe their voice lines to a particular interexchange carrier ("IXC"). These neutrality obligations included, for example, a requirement that the RBOCs never recommend any particular IXC, and a requirement that the order in which available IXCs were presented to customers be rotated so that no particular IXC got the benefit of being named first. As an absolute minimum, these "equal access" type obligations should apply to ILEC treatment of affiliated and non-affiliated ISPs when dealing with end users ordering or inquiring about xDSL service.

An alternative arrangement, however, would be simpler to administer and probably more effective as well. The Commission has proposed that ILECs seeking to offer xDSL service to end users free from the direct obligations of Section 251(c) might be permitted to do so if they form a truly separate "Data CLEC" entity to do so.[13] The data affiliate would have to deal with the ILEC parent on a truly independent, arms-

[13] In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability; Petition of Bell Atlantic Corporation For Relief from Barriers to Deployment of Advanced Telecommunications Services; Petition of U S WEST Communications, Inc. For Relief from Barriers to Deployment of Advanced Telecommunications Services; Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Technology; Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act; Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996; Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service, *Memorandum Opinion and Order and Notice of Proposed Rulemaking,* CC Docket Nos. 98-147, 98-11, 98-26, 98-78, and 98-91 (released August 7, 1998) ("*Data CLEC NPRM*") at ¶¶ 85-117.

length basis. Applying those same separation requirements to ILEC ISP affiliates would go far towards preventing the ILEC from unfairly favoring its ISP affiliate.

The responding ISPs specifically suggest that these separation requirements be applied to any ILEC ISP affiliate in any case where the ILEC offers an xDSL service to end users.[14] This requirement would be justified, as a legal and policy matter, on two grounds. First, as noted above, there is an unusually high degree of correspondence between end users seeking to purchase xDSL service and end users seeking to obtain high-bandwidth access to the Internet. This special opportunity for discrimination by the ILECs creates a practical need for special anti-discrimination measures. Second, Section 706 is a specific statutory directive to the Commission to use its regulatory powers to encourage the deployment of advanced telecommunications capability by promoting competition. As a result, while the strict non-discrimination requirements proposed by the Commission in the *Data CLEC NPRM* (and proposed for use in the ISP-affiliate context here) are more stringent than those required by the "normal" non-structural separations regime, special requirements are justified in this context.

b. Clean, Unswitched Copper.

As noted above, well before the enthusiasm for xDSL services achieved its current level following the various RBOC Section 706 petitions, individual innovative ISPs had already discovered that a clean, unswitched copper circuit, when used with appropriate CPE, could be used to send very high data rates between an ISP and an individual customer. The final step that the Commission should take to ensure that customers can choose their own ISPs for high-bandwidth Internet access — and encourage the deployment of advanced telecommunications capability at the same time — is to mandate that ILECs file tariffs that offer clean, unswitched copper circuits to

[14] If the ILEC's only xDSL service is offered through the truly separate data CLEC affiliate, then the separation requirements as between the data CLEC affiliate and the ILEC should be applied as between the data CLEC affiliate and the ISP affiliate as well.

ISPs and end-users alike, at cost-based rates and on reasonable and non-discriminatory terms.[15]

Aside from the fact that it is somewhat counter-intuitive to think of a plain unswitched copper circuit as a form of "advanced telecommunications capability," there is nothing novel or peculiar about this proposed requirement. Unswitched copper circuits (albeit of uncertain cleanliness) have long been available from ILECs out of their intrastate tariffs, under the rubric of "alarm" or "local area data" circuits. These circuits have historically been priced at relatively low levels, as befits the humble technology involved in providing them: copper from each end of the circuit to the serving wire center for that location, and, if needed, cross-connections to an inter-office copper circuit between the wire centers. The Commission should mandate that this basic service be made available at cost-based rates, and on just, reasonable and non-discriminatory terms and conditions.

In this regard, the Commission should be aware that while digital subscriber line access multiplexers ("DSLAMs") are a form of "telecommunications equipment," CPE — customer premises equipment — can perform the same critical function of sending and receiving an electrical signal encoded with a high-speed data signal. While ISPs will in many cases work with carriers (ILECs and CLECs alike) to

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[15] A number of ISPs that are members of TISPA have been directly told by Southwestern Bell that attaching xDSL CPE to a bare copper "alarm circuit" constitutes an impermissible use of the circuit, and Southwestern Bell has refused to sell ISPs either alarm circuits or copper special access links for use with xDSL CPE. A similar policy — also plainly designed to put a freeze on the market while the ILECs determine their own strategy for the data-over-copper market — has been implemented by U S West, which has attempted to withdraw its "dry copper" offerings from intrastate tariffs.. *See* Comments of APKNet, Ltd., *et. al,* cited at *Notice of Inquiry* at ¶ 20 & n.12. Aside from being flatly anticompetitive, this conduct flies in the face of the Commission's long-standing requirement that carriers may not deny the attachment to their networks of CPE that is privately beneficial without being publicly harmful. *See* note 7, *supra.* Indeed, in the TISPA's experience, some smaller Texas ILECs — with a less monopolistic bent than Southwestern Bell — have embraced the opportunity to work with ISPs to utilize xDSL-over-dry-copper as a means of providing end users with high-speed connectivity to the Internet.

obtain high-speed data transport ***service*** (*i.e.*, with the carrier providing the "intelligence" needed to make the service work), in other cases it is preferable for equipment owned by the ISP and the customer to provide the intelligence, with the carrier (here, the ILEC) providing nothing but the most basic form of carriage — a copper transmission path.[16]

The basic case in favor of requiring ILECs to provide clean, unswitched copper on reasonable and non-discriminatory terms, and at cost-based rates, has been made previously in comments cited by the Commission in the *Notice of Inquiry*.[17] Those comments are respectfully incorporated here by reference.

c. Unbundling.

Many ISPs have developed commercial relationships with one or more CLECs. On the whole, CLECs are more responsive as providers of the services that ISPs need than are the ILECs (whether because CLECs are fundamentally more entrepreneurial, market-oriented firms or because ILECs have historically viewed ISPs as somewhere between operational annoyances and competitive threats). Many ISPs, therefore, are extremely interested in being able to use CLEC services to the maximum extent possible.

In the context of xDSL-based high-speed access to the Internet, this means that the following three functions must be completely unbundled:

- Transmission of Internet data over the xDSL loop.

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[16] The Retail ISPs expect that this service will be especially useful in efforts to provide a reasonably-priced high-bandwidth Internet access service to small businesses, although in theory all customers — including residence customers and businesses of all sizes — could take advantage of it.

[17] *See Notice of Inquiry* at ¶ 20n. 12.

- Packet-switched or other transport of Internet data from multiple central offices to an aggregation point for delivery to the ISP.
- Links between the ISP's location and the aggregation point.

In other words:

(1) A CLEC (serving an ISP) must be able to provide xDSL loops to customers in fair competition with the ILEC.

(2) Even if the ILEC provides the xDSL service to the end user, a CLEC (serving an ISP) must be able to pick up customers' data at various end offices and transport that data to an aggregation point.

(3) Even if the ILEC provides the xDSL service to the end user ***and*** transports the data to an aggregation point, a CLEC (serving an ISP) must be able to provide the link between the ISP and the aggregation point.

There is nothing subtle or complex about this situation or the proposed requirements just outlined. The ILEC, if it can, will want to bundle together (a) the provision of xDSL service to an end user (over which its 99+% share of the loop plant gives it undisputed monopoly power) with (b) the transport of multiple end users' xDSL data to an aggregation point, and (c) connections between that point and the ISP. Permitting them to do so is anticompetitive.

Perhaps the best historical analogy here is Feature Group D ("FGD") service prior to the Commission's *Expanded Interconnection* proceedings. While the various access rate elements were separately identified and separately priced, until competitive access providers were able to connect their fiber facilities to ILEC tandems and end offices, FGD was essentially an "all-or-nothing" service.

The ILECs should not be permitted to recreate that unfortunate state of affairs in the realm of connections from end users to ISPs for high-bandwidth access to the Internet. The way to avoid that result is to require that the data channel on an xDSL

loop, transmission of data from xDSL loops to one or more aggregation points, and connections from ISPs to those aggregation points, must be offered on an unbundled basis. ISPs will then be free to use CLECs to provide some or all of those services on the basis of which carrier — the ILEC or the CLEC — offers the best price, quality, and other terms.

5. Conclusion.

As the currently competitive market for retail Internet access evolves to accommodate the high-speed access made possible by xDSL technology, that market is peculiarly vulnerable to anticompetitive ILEC activities. This peculiar vulnerability arises from a combination of the ILEC's unchallenged monopoly control of the copper loop infrastructure to which xDSL technology is applied, and the fact that essentially the only consumer demand for xDSL-based transmission service arises as a complement to consumer demand for high-speed access to the Internet.

This situation presents enormous opportunities for the ILEC to unfairly favor its ISP affiliate by diverting customers who express an interest in the monopoly service (xDSL transmission) to the affiliated, unregulated ISP. At the same time, it presents enormous opportunities for the ILEC to bundle its monopoly control of xDSL-equipped copper with (at least potentially) competitive local data transport services.

Both long-standing pro-competitive policies embodied in the Act, as well as Section 706 in particular, provide a basis for specific Commission action to prevent these anticompetitive results from occurring:

- First, require the ILECs to deal with affiliated and unaffiliated ISPs on a strictly non-discriminatory basis, including a requirement that once an ILEC offers xDSL service to end users, the ILEC's ISP affiliate must be at least as separate as the "data CLEC affiliate" proposal in the *Data CLEC NPRM*.

- Second, require the ILEC to offer clean, unswitched point-to-point copper connections between ISPs and end users on just, reasonable, non-discriminatory terms and on cost-based rates.

- Third, require the ILEC to unbundle (a) xDSL loop transmission, (b) transmission of xDSL Internet data to aggregation points, and (c) connections between ISPs and aggregation points. ISPs and other customers should be free to purchase any of these arrangements separately from the ILEC or from any available CLECs that offer similar services.

These simple steps will go far not only towards protecting the vibrant competition that already exists in the market for retail Internet access, but, at the same time, harness the

power of that competition to promote the rapid deployment of high-speed xDSL technology, directly fulfilling the mandate of Section 706.

Respectfully submitted,

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I, Linda M. Blair, a secretary with the law firm of Cole, Raywid & Braverman, L.L.P., do hereby certify that copies of the foregoing were sent via hand delivery, this 15th day of September, 1998, to the following:

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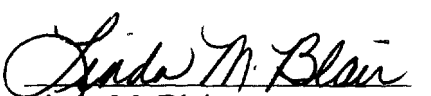
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